No. 80-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OIL COMPANY, ET AL.,
Petitioners,

v.

WESLEY P. BERNARD, ET AL.,
Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICUS CURIAE* ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The Association of Trial Lawyers of America is a national association composed of lawyers regularly engaged in the trial and appeal of all types of contested matters, as well as judges, professors of law, lawyer-administrators, and other lawyers. The membership of the Association numbers approximately 40,000. The Association, through its appropriate officers and committees, has authorized its participation in this cause as *amicus curiae.* This brief is filed with the written consent of all parties.

This appeal involves the use of and the interpretation of *Sample Pretrial Order No. 15—Prevention of Potential*

Abuses of Class Actions as set forth in the *Manual for Complex Litigation,* Part II, §1.41 and as explained in Part I, §1.41.

At the invitation of the Board of Editors of the *Manual,* the Association has participated in the preparation of recent revisions of the *Manual* through an ad hoc committee appointed by the President of the Association. In both 1976 and 1980, the Association expressed to the Board of Editors their concern with the procedures recommended in §1.41 and with the chilling effect on precious First Amendment rights.

The most recent of those expressions of concern was contained in the Memorandum Report of the Association of Trial Lawyers of America to the Board of Editors of the Manual for Complex Litigation and was dated July 30, 1980:

> Preventing Potential Abuse of Class Actions
>
> The Potential abuses recounted in §1.41 of the Manual are a source of continuing concern to ATLA. The types of communications referred to appear not to be as common as the Board might fear. Perhaps our experience is jaded, however, by naivety or by the possibility that these communications are difficult to detect and often escape exposure. Particularly difficult to detect are communications which defendants direct toward class members since, in the usual case, the defendant has superior knowledge of the identities and whereabouts of class members and often has a continuing relationship which lends itself to frequent contacts or communications.
>
> The danger perceived in this area, however, is not with the necessity for preventing potential abuses, but with the procedures to be utilized to accomplish that end. In its 1976 Report, ATLA expressed concern over the potential chilling effect of non-communication orders and rules on precious First Amendment rights. We reiterate that concern here and urge the Board to consider §1.41 in light of the June 19, 1980, *en banc* decision of the United States Court of Appeals for the

Fifth Circuit in *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980). That decision, which was not rendered until after preparation of the Tentative Draft, reversed the very case referred to in the Draft and cited at Footnote 42c. The potential for inadvertent abuse of constitutionally protected freedoms may outweigh the potential for abuse of the class action process.

The Association appears in this cause as *amicus curiae* to express its continuing concern with the effect upon First Amendment freedoms of the imposition of the order and rule in §1.41 of the *Manual* in a non-selective manner and based upon anticipation of abuse of class action procedures.

SUMMARY OF ARGUMENT

This appeal involves the constitutionality of *Sample Pretrial Order No. 15* as recommended and published in the *Manual for Complex Litigation,* §1.41 of Parts I and II. The order purports to prevent potential abuses of class actions by prohibiting all communication by parties in the class action and their counsel with actual or potential class members who are not formal parties in the action. The *Manual* recommends that the order be issued pretrial in all class actions in anticipation of potential abuses. The order was, in fact, imposed upon counsel and parties in this Title VII class action when they openly opposed a conciliation agreement between the defendants and the Equal Employment Opportunity Commission.

The conduct of plaintiffs and their counsel, which resulted in the imposition of this order, was protected activity under the First Amendment as interpreted and applied by this Court. Further, the imposition of the order as recommended by the *Manual* and as issued herein is inherently unconstitutional as a prior restraint on free speech. The district court was not faced with a threat of "direct, immediate, and irreparable damage" to the judicial process and the *Manual* does not contemplate such a threat as the basis for issuing the order.

Apart from the unconstitutional circumstances under which the order was issued, it is unconstitutionally vague and overbroad. Its terms are such that no reasonably intelligent person, lawyer or lay person, could be expected to understand and abide by the order. Its reach is far beyond that required by the situation confronting the district court—and the *Manual* would not require any threat to the judicial process, it would "anticipate" abuse. No consideration was given to reasonable, available, less severe alternatives.

The order purports to exclude First Amendment rights asserted by the parties or counsel. However, the order obviously "chills" the assertion of one's constitutional rights, as one would assert them at peril of being held in criminal contempt of court. Any communication is a per se violation of the order.

No Circuit Court has upheld the validity of the order issued herein. The Fifth Circuit, sitting *en banc,* held it to be unconstitutional in this action. That decision should be affirmed by the Court.

ARGUMENT

I

THE DISTRICT COURT'S ORDER IS AN UNCONSTITUTIONAL "PRIOR RESTRAINT" ON SPEECH AND CONDUCT

Prior restraints have been viewed with great displeasure in the American Legal system, due largely to the severe impact they place on judicially guarded First Amendment rights. *Near v. Minnesota,* 283 U.S. 697 (1931). Though prior restraints on speech are not regarded as unconstitutional per se, this Court has repeatedly stated that "any system of prior restraints comes to this court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v Sullivan,* 372 U.S. 58, 70 (1968). *See also Nebraska Press Association v. Stuart,* 427 U.S. 539, 556-59

(1976); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558-59 (1975); *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971). The burden of justification for a prior restraint is, therefore, far greater than that imposed in cases dealing only with subsequent restrictions on freedom of speech.

It is generally accepted that a prior restraint of speech is a "predetermined judicial prohibition restraining specified expression . . ." imposed by a judicial decree, the violation of which is punishable by a contempt citation. *Hirschkop v. Snead,* 594 F.2d 356, 368 (4th Cir. 1979); *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 248 (7th Cir. 1975). This punishment of contempt is the prime distinguishing feature between a "prior restraint" and a criminal statute that prohibits certain expression. In a prosecution for the violation of the latter an individual is protected by the full panoply of criminal procedural safeguards, and is free to assert the unconstitutionality of the statute as a defense. *See Shuttlesworth v. City of Birmingham,* 394 U.S. 147 (1969). In contrast, an individual who violates an injunction is precluded from attacking its constitutional validity in a subsequent contempt proceeding. *Walker v. City of Birmingham,* 388 U.S. 307 (1967). The proper method of challenge to an injunction lies in a prior application to the court for modification or dissolution, or in a direct appeal, not in a constitutional attack after its violation. *Walker, supra,* 388 U.S. at 317. As this Court noted in *Nebraska Press Association v. Stuart, supra,* a prior restraint has "an immediate and irreversible sanction," the threat of which doesn't merely "chill" speech but rather "freezes it." 427 U.S. at 559.

For a prior restraint to be lawful it "must fit within one of the narrowly defined exceptions to the prohibition against prior restraints." *Southeastern Promotions, Ltd. v Conrad, supra,* 420 U.S. at 559. The general rule is that such restraint is justified only if the expression to be re-

strained will "surely result in direct, immediate, and irreparable damage." *New York Times Co. v. United States, supra,* 403 U.S. at 730. As this Court stated in *New York Times,* it is not a question of probabilities or mere speculation of harm, but rather a question of whether there was a substantial certainty of harm, i.e., the "publication must inevitably, directly, and immediately, cause an occurrence of an event kindred to the imperiling of a transport already at sea . . ." 403 U.S. at 726-27.

There are two additional prerequisites to a constitutionally permissible prior restraint. First, the restraint must be the least restrictive means of preventing the threatened harm. It must be drawn as narrowly as possible, and it cannot be sustained if reasonable alternatives exist that would impact less severely on First Amendment rights. *Nebraska Press Association v. Stuart, supra; Carroll v. Commissioners of Princess Anne,* 393 U.S. 175 (1968). Second, the restraint "must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559

A. The Conduct of a Lawyer in the Course of a Legal Action is Constitutionally Protected.

The right, indeed, the duty of courts to protect their procedures and to take all reasonable means of ensuring a fair trial to every litigant is beyond question; and, clearly, the courts have the inherent power to take appropriate remedial measures "to protect their processes from prejudicial outside interferences." *Sheppard v. Maxwell,* 384 U.S. 333, 363 (1966). When a lawyer engages in conduct which interferes with those processes, that lawyer is subject to censure. *Id.* As an officer of the court, a lawyer has a higher duty than a lay person to protect the judicial process and to ensure its fairness; certainly, they are subject to more disciplinary sanctions. *Hirschkop v. Snead, supra,* 594 F.2d

at 366. So, when the right of a lawyer to free speech conflicts with the right of litigants to a fair trial, the rights of litigants must take precedence. *Chicago Council of Lawyers v. Bauer, supra,* 522 F2d at 248.

However, lawyers do enjoy the right of free speech and an order which denies those First Amendment rights to a lawyer must be measured against and protected by constitutional requirements. The Seventh Circuit has suggested that we should be even more reluctant to silence attorneys representing a plaintiff class in an action such as this action.

> Sometimes a class of poor or powerless citizens challenges, by way of a civil suit, actions taken by our established private or semi private institutions or governmental entities. . . . The lawyer representing the class plaintiffs may be the only articulate voice for that side of the case. Therefore, we should be extremely skeptical about any rule that silences that voice.
>
> *Chicago Council of Lawyers v. Bauer, supra,* 522 F.2d at 258.

No lawyer could competently prepare a class action for trial under the restrictions of the district court's order. They are prohibited from initiating any contact with potential or actual class members not a formal party—an essential source of testimony in a Title VII class action. They may not even inform those persons that the class action has been filed on their behalf. Plaintiffs' lawyers were effectively cut off from the market place in which free speech should be tested. Quite possibly, it is a violation of due process to deny an attorney access to witnesses. *Zarate v. Younglove,* 86 F.R.D. 80, 97-8 (C.D. Calif. 1980).

To the extent that plaintiff's lawyers were employed by the NAACP Legal Defense Fund, their First Amendment right to contact aggrieved citizens and to counsel them as to their legal rights, including litigation, has been previously litigated and firmly established by this Court in *NAACP v. Button,* 371 U.S. 415 (1963) and the line of cases following it. *See In re Primus,* 436 U.S. 412 (1978); *United*

Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia ex rel State Bar,* 377 U.S. 1 (1964).

As in *Button,* the subject matter of the case at bar is racial discrimination. The only difference is that in the instant case the employees had a choice between a conciliation offer and a lawsuit, whereas in *Button* there was no conciliation offer and the choice was whether or not to participate in a lawsuit.

On authority of the *Button* line of cases, the communications between formal parties to the suit and potential class members, also forbidden by the plenary order, is at least equally protected activity under the First Amendment. *See United Transportation Union v. State Bar of Michigan, supra; United Mine Workers v. Illinois State Bar Association, supra; Brotherhood of Railroad Trainmen v. Virginia ex rel State Bar, supra.* As this Court stated in *United Transportation Union,* "The common thread running through *our decision in NAACP v. Button, Trainmen,* and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a federal right within the protection of the First Amendment." 401 U.S. at 585.

B. The District Court's Order Was Constitutionally Infirm in Its Genesis.

The order imposed upon counsel and parties by the district court, hereafter referred to as the "*Bernard* order," was taken verbatim from the *Manual for Complex Litigation,* Part II, §1.41, *Sample Pretrial Order No. 15.* The accompanying text, Part I, §1.41, exhorts trial judges "to anticipate abuse" in class actions under Rule 23, sets forth "potential abuses," and recommends "timely action" by local rule, by order, or by both means. Clearly, the thrust of the text is that the district courts should apply the recommended restrictions on communications with class members

prior to the occurrence of, or even the threat of, any abuse of the class action process. Obviously that approach cannot meet the "direct, immediate, and irreparable damage" test. Far from protecting an imperiled "transport already at sea," the *Manual* recommends issuance of the order when the vessel is still at the dock, "anticipating" the voyage.

Inconsistently, the *Manual* acknowledges that these "potential abuses" occur rarely:

> It must be noted however, that generally, the experience of the courts in class actions has been favorable. The aforementioned abuses are the exceptions in class action litigation rather than the rule. Nevertheless, they *support* the idea that it is appropriate to guard against the occurrence of these relatively rare abuses by local rule or order. *Manual,* Part I, §1.41, pgs. 36-37 (emphasis supplied).

"Support" hardly rises to a threat of "direct, immediate, and irreparable damage" to the judicial process.

The *Manual* does caution that the recommended order "is not intended to be either a permanent or an absolute prohibition of contact with actual or potential class members," and proceeds to recommend a prompt hearing after entering the order for the purpose of relaxing the order and for the presentation of proposed communications with class members. The final paragraph of the recommended order provides for that hearing. Interestingly, this was the one paragraph of the recommended order omitted by the trial court in the *Bernard* order.

This Court has never spoken on the question of what degree of consideration should be given to the recommendations of the *Manual for Complex Litigation.* We would acknowledge that the *Manual* is entitled to great respect; however, we would also contend that it is not entitled to the deference of regulations issued by agencies charged with the enforcement of Acts of Congress. The Ninth Circuit has limited the role of the *Manual* as a source of judicial authority, ". . . in any case, the *Manual* cannot serve as a

source of judicial power because the committee that drafted it possessed authority only to issue recommendations. *See Manual for Complex Litigation, Xiii - Xix* (1973)." *Pan American World Airways, Inc. v. United States District Court for Central District of California,* 523 F.2d 1073, 1078 (9th Cir. 1975).

The fact that the *Bernard* order involves the judicial administration of justice does not bring it within a recognized exception permitting prior restraints. In fact, quite the opposite is true. Even in the context of a criminal defendant's right to a fair trial "the barriers to prior restraint remain high and the presumption against its use continues intact." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 570. Our courts have articulated standards for judging when a prior restraint will be constitutionally permissible in the context of the fair administration of justice. The Fifth Circuit and others have held that "[B]efore a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be an imminent, not merely a likely, threat to the administraiton of justice. The danger must not be remote or even probable; it must immediately imperil." *U.S. v. Columbia Broadcasting System, Inc.,* 497 F.2d 102, 104 (5th Cir. 1974). This standard comports with the *New York Times* test of substantial certainty of "direct, immediate, and irreparable harm." Clearly, the *Bernard* order fails to meet the requisite standard both in its conception and by reason of the complete absence of findings by the trial court indicating any imminent threat to the administration of justice. *Bernard v. Gulf Oil Company, supra,* 619 F.2d at 466.

II
THE DISTRICT COURT'S ORDER IS UNCONSTITUTIONALLY VAGUE

The order imposed in this action is also unconstitutional because it is impermissibly vague.

> Vague rules that restrict expression also offend the first amendment because they chill freedom of speech. Their uncertain meanings require those persons who are subject to the rule to "steer far wider of the unlawful zone, . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt,* 377 U.S. 360, 372, 84 S.Ct. 1316, 1323, 12 L.Ed.2d 377 (1964).
>
> *Hirschkop v. Snead, supra,* 594 F.2d at 371.

The order sets forth four specific areas of communication with class members which are prohibited to both lawyers and lay parties:

> (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b) (3) of Rule 23, F.R.Civ.P. and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administraiton of justice.

But, these four prohibitions are introduced with the statement, "The communications forbidden by this order include, but are not limited to . . . ." What other communications are forbidden? The only clue within the order follows the recitation of the four forbidden areas: "The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order."

No lawyer, far less a lay party, could determine with any certainty from the above language what they may or may not do thereafter in the preparation of the action for trial.

"All other ethical, legal and equitable obligations" might be meaningful to a lawyer. It should mean, "Conduct yourself as an ethical lawyer." If so, it is superfluous; if not, it is unconstitutionally vague. But what does it mean to a lay party?[1]

Paragraph (d), above, prohibits communications "which may tend to misrepresent." It would be difficult, but feasible, to abide by an order which prohibited communications "which misrepresent;" it is impossible to interpret safely "which may tend to misrepresent." This phrase was found to be both unconstitutionally vague and overbroad in *Zarate v. Younglove, supra,* 86 F.R.D. at 103.

And, how does one comply with the prohibition against misrepresenting "potential Court orders?" That requires a prescience which few trial lawyers, or judges, possess!

These vague provisions would certainly "chill" the activities of parties and counsel. The wise person seeing a sign, "Danger—Thin Ice," will give it a wide berth; the cautious will not go ice skating.

III
THE DISTRICT COURT'S ORDER IS UNCONSTITUTIONALLY OVERBROAD AND IGNORES REASONABLE ALTERNATIVES

A constitutional prior restraint must be carefully drafted. It must be drawn as narrowly as possible and it will not be sustained if there are reasonable alternatives which will have a less severe impact on First Amendment rights. *Nebraska Press Association v. Stuart, supra; Carroll v. Commissioners of Princess Anne, supra.*

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[1]Compare, *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 255-56 (7th Cir. 1975) holding unconstitutionally vague the phrase, "or other matters that are reasonably likely to interfere with a fair trial." Accord, *Hirschkop v. Snead,* 594 F.2d 356, 373 (4th Cir. 1979).

A. The District Court's Order Is Unconstitutionally Overbroad

> In a series of decisions this court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose. *Shelton v. Tucker,* 364 U.S. 479, 488 (1960) (footnotes omitted).

With the above constitutional guidelines from this Court, the lower courts have adopted varying standards to determine to what extent judicial orders may curtail the First Amendment rights of litigants and counsel to comment on pending litigation. In *Hirschkop v. Snead, supra,* the Fourth Circuit held that rules proscribing comments on pending litigation are constitutionally prohibited unless there is a "reasonable likelihood" that such dissemination will interfere with the administration of justice. 495 F.2d at 370. In *Chicago Council of Lawyers v. Bauer, supra,* the Seventh Circuit adopted a narrower and more restrictive standard, holding that comments on pending litigation can be constitutionally restrained only if they pose a "serious and imminent threat of interference with the fair administration of justice." 522 F.2d at 249. The two courts agreed that rules prohibiting lawyers' comments about civil trials were unconstitutional and the Fourth Circuit included all bench trials in their ruling. 594 F.2d at 371-72, 373; 522 F.2d at 257-59. Of course, being a Title VII action, the action here involved was a civil action which should have resulted in a bench trial. The courts are in unanimous agreement that the interest of the judiciary in the proper administration of justice does not license a blanket exception to the First Amendment. *See Wood v. Georgia,* 370 U.S. 375 (1962); *Craig v. Harney,* 331 U.S. 367 (1847); *Pennekamp v. Florida,* 318 U.S. 331 (1946); *Bridges v. California,* 314 U.S. 252 (1941).

The order at issue is inherently overbroad as published in the *Manual* and unconstitutionally overbroad as issued. It was taken verbatim from the *Manual* with no attempt to apply it specifically to the alleged abuses. Consequently, the order prohibits abuses which could not occur in this action and it authorizes conduct which could not occur in this action.

For example, paragraph 2 (c) of the *Bernard* order forbids solicitation of requests to opt out under Rule 23 (b) (3). This conduct could not occur in this action. First, Rule 23 (b) (3) contains no provision for a class member to opt out; one opts out under Rule 23 (c) (2) (A). Secondly, Title VII class actions are (b) (2) class actions. Rule 23 contains no provision for opting out of a (b) (2) class action.

The *Bernard* order also contains an exception "in the performance of the duties of a public office or agency (such as the Attorney General) . . . ." Of course, neither the Attorney General nor any other government attorney was involved in this action.

Far from being "no greater than is necessary or essential," the *Bernard* order reached out to forbid all communication "concerning this action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court." Simply, the order established a "permit" system. *Zarate v. Younglove, supra,* 86 F.R.D. at 104.

The alleged threat to the court's management of this class action is described by Petitioner as follows:

> On May 22, 1976, four days after this action was filed, attorneys for Respondents attended a meeting of actual and potential class members (J.A. 115, 118), and according to affidavits filed in this case, discussed with the potential class members the issues involved in this action, answered questions from the audience, and explained the administrative and legal problems inherent in fair employment litigation. (J.A. 115, 116, 118).

> After the meeting, Gulf's counsel, by emergency motion, represented to the district court that it had learned that an attorney for Respondents advised the participants at the meeting to mail back the checks they had received from Gulf, since by prosecuting the present action Respondent's attorney could recover at least double the amount which was paid under the conciliation agreement. (J.A. 22, 23, 24). Gulf's emergency motion sought an interim order limiting communications between potential class members and all parties and their counsel to this lawsuit. (J.A. 21, 25). On May 28, 1976, District Judge Steger, ruling in Chief Judge Fisher's absence, granted Gulf's motion and entered the interim order. (J.A. 44).
>
> *Brief for the Petitioners,* pg. 5.

These allegations describe an attack on the conciliation agreement negotiated between Petitioner and the Equal Employment Opportunity Commission. Even assuming that the conciliation agreement was entitled to the court's protection (J.A. 71-80), a highly debatable issue in itself, or that Respondents has misrepresented the context and effect of that agreement, the *Bernard* order does not specifically address that issue in any manner. If this issue was intended to be included in the prohibition of communications "which may tend to misrepresent the status, purposes and effects" of the action or "actual or potential Court orders" or to reflect adversely on the parties or the court (paragraph 2 (d) of the order, *supra),* it is unconstitutionally vague and broad as discussed above.

Indeed, the order in question "hangs over [people's] heads like a Sword of Damocles." *Arnett v. Kennedy,* 416 U.S. 134, 231 (1974). Counsel's decision to seek prior approval of the court before attempting to communicate with potential class members aptly demonstrates that "the value of the sword of Damocles is that it hangs—not that it drops." *Id.*

may be made by the parties or their counsel free of restraint." *(Brief for Petitioners,* pg. 33.) Petitioner proceeds to acknowledge that communications by respondent parties or their counsel would be tested in criminal contempt proceedings and projects that the determination would be based upon

> . . . the applicable constitutional test for solicitation in effect at the time the violation is charged. Presently, this would require an analysis by the court of whether the solicitation was commercial, under the standards of *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978) or whether the solicitation was a form of political expression under the standard of *In re Primus, supra.* Thus, the order's exception allows any court imposed prohibition on speech to be constitutionally challenged by the one charged with its violation and then only after all the safeguards of the criminal justice system are fulfilled.[37]
>
> 37. Violations of the order would be punished by criminal contempt since the objective would be to vindicate the authority of the court. *See Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 441 (1911).

The means of enforcing the order in issue, criminal contempt, are not disputed. Petitioners acknowledged the means of enforcing this order before the Fifth Circuit:

> the appellees accept that the means of enforcement intended is the contempt power of the court, and we agree.[14]
>
> 14. Contempt here would be criminal because used to punish past misconduct. *In re Timmons,* 607 F.2d 120, 123-24 (5th Cir. 1979).
>
> *Bernard v. Gulf Oil Co.,* 619 F.2d 459, 468-69 (5th Cir. 1980).

And, of course, in that criminal contempt proceeding, the burden would be upon the attorney or party asserting their First Amendment rights.

> The conditional defense is accompanied by a second chilling effect, the risk of trial on criminal contempt charges, with guilt or innocence possibly turning on

whether one's assertion of constitutional protection has been made in "good faith." Moreover, the omissions and ambiguities of the order and possible differing constructions as to when, if at all, one is protected against contempt, accentuate the chilling effect.[21]

21. For example, in addition to the general ban on communications, subparagraph (a) of paragraph (2) expressly forbids solicitation. Prudent counsel very well may conclude that he cannot safely rely upon asserting constitutional protection in the face of this specific ban. If there is a "good faith" defense can counsel be in good faith if he does what he is expressly ordered not to do? As one commentator has noted:

> The proviso exempting constitutionally protected communication does not eliminate, indeed, it highlights the overbreadth and resultant chilling effect of the Manual's proposed rule.

Note, 88 Harv. L. Rev. 1911, 1922 N. 74 (1975). See also *Zarate v. Younglove,* 22 FEP Cases 1025, 1042 (C.D. Cal, 1980).

Bernard v. Gulf Oil Co., 619 F.2d 459, 471 (5th Cir. 1980). See also, *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 251 (7th Cir. 1975) (Burden upon one "charged with violating such a rule . . .")

It is not at all certain that the "good faith" belief in the First Amendment status of one's non-judicially approved communications would be a defense in criminal contempt proceedings. Petitioners have so contended;[2] but it is at best a potential defense and hardly security for the assertion of the First Amendment rights of respondent parties and their counsel. As one court has observed, this supposed defense "simply exchanges overbreadth for vagueness." *Zarate v. Younglove, supra,* 86 F.R.D. at 103-04. No one has contended that the mere filing of an alleged First Amendment communication is a defense.

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[2]*Bernard v. Gulf Oil Co.,* 619 F2d 459, 470 (5th Cir. 1980).

V

THERE IS NO CONFLICT BETWEEN CIRCUITS AS TO THE VALIDITY OF THE DISTRICT COURT'S ORDER.

Petitioner asserts that there is a conflict between the Fifth Circuit's *en banc* opinion herein and the Second Circuit's opinion in *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972). *Brief for Petitioners,* pgs. 13, 21-22 n. 15. In fact, there is no conflict among the Circuits as to the validity of the substance of the order issued in this action. *No Circuit Court has approved the order* issued in this action and recommended in the *Manual for Complex Litigation,* Part I, §1.41.[3]

The Fifth Circuit held the challenged order unconstitutional in the instant action.[4] The Third Circuit has held that the content of the order is neither authorized as a local district court rule[5] nor as a district court order.[6] The Fourth Circuit and the Seventh Circuit have declared unconstitutional bar association rules designed to achieve many of the same purposes as the challenged order but not aimed specifically at class actions.[7]

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[3]The *Manual* cites *Weight Watchers* as authority for the almost unreviewable discretion of the trial court to regulate communications between counsel and class members and potential class members. *Manual for Complex Litigation,* Part I, §1.31 n.33. At best, this is an overstatement of the holding in *Weight Watchers* as discussed later in this section, *infra,* at pg. 20.

[4]619 F.2d at 477-78.

[5]*Rodgers v. United States Steel Corp.*, 508 F.2d 152, 163-65 (3d Cir. 1975). While declining to hold the rule unconstitutional, the court recognized that it was a "prior restraint." 508 F.2d at 162, 164.

[6]*Coles v. Marsh,* 560 F.2d 186, 189 (3d Cir. 1977). Again declining to rule on a constitutional basis, the court sets forth a requirement for a "specific record" showing the threat to the court, *Id.*, which would satisfy First Amendment requirements.

[7]*Hirschkop v. Snead,* 594 F.2d 356 (4th Cir. 1979) *(en banc); Chicago Council of Lawyers v. Bauer,* 522 F.2d 252 (7th Cir. 1975).

The order at issue in *Weight Watchers, supra,* differed drastically from the order issued herein. The order challenged there was quite specific and designed to remedy a specific abuse.[8] The Second Circuit held that the order was not a "final decision" appealable under 28 U.S.C. §1291[9] nor reviewable under a petition for mandamus.[10] Thus, the court did not consider the merits of the order involved herein. Considering the relatively insignificant effect of the order before the Second Circuit, we do not challenge that decision.

The only potential conflict among the Circuits is whether this order, when issued, is subject to review prior to a final judgment. The Third Circuit has held that the order, coupled with a local district court rule to the same effect, is not reviewable under 28 U.S.C. §1292 (a) (1) but is reviewable under 28 U.S.C. §1651; therefore, they did not reach the question of whether the order [rule] is reviewable under 28 U.S.C. §1291. *Rodgers v. United States Steel Corporation,* 508 F.2d 152, 159-65 (3rd Cir. 1975); *Coles v. Marsh,* 560 F.2d 196 (3rd Cir. 1975) (order reviewed on petition for writ of mandamus). The Second Circuit would perhaps reject those results under the holding of *Weight Watchers, supra;* but the issue is totally different from that which they decided. Since the *en banc* decision below in this action, the Fifth Circuit has reviewed and vacated a local district court rule embodying the recommendations of the *Manual* under a petition for writ of mandamus. *In re Norton,* 622 F.2d 917 (5th Cir. 1980).

There is a conflict among District Courts as to the validity of the order in issue. In *Zarate v. Younglove, supra,*

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[8]In the absence of the assigned trial judge, another district judge issued the order at issue herein to preserve the status quo. Upon the return of the assigned judge, a prompt hearing was held and a modified order issued which restored communication with class members with the right of the class members' counsel to be present. It was only the latter order which was appealed. 455 F.2d at 772.

[9]455 F.2d at 722-73.

[10]455 F.2d at 775.

the court found the proposed order to be vague and overbroad and posing an impermissible prior restraint. Absent a showing of a serious and imminent threat, the court declined to issue the order. 86 F.R.D. at 94-106. The constitutionality of a local district court rule adopted in accordance with the *Manual's* recommendation was upheld in *Waldo v. Lakeshore Estates, Inc.* 433 F. Supp. 782 (E.D. La. 1977) (that rule would now be invalid under the Fifth Circuit decision in this case). Without reaching the constitutional question, the District of Kansas upheld its authority to issue this same order. The court noted "that plaintiff's attorney files a very great number of asserted class actions in this court, and the nature and extent of his requested discovery becomes a point of contention in almost every one." *Peals v. Southwestern Bell Telephone Company,* Case No. 78-68-C5, Slip opinion, September 13, 1977. The number and complexity of discovery requests in prior cases is hardly a proper subject of judicial notice and would scarcely seem to justify the imposition of the order in question.

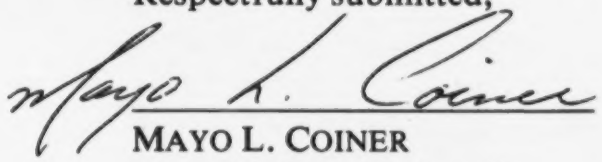
As trial lawyers, we recognize the pressures under which a trial judge performs; so we do not mean to castigate the trial judge for issuing the *Bernard* order and ignoring the alternatives. He was absent when the original order was issued. Upon his return, the situation consisted of an existing order prohibiting communication, defense attorneys requesting far greater relief than the situation required—if any relief was required, and a recognized publication recommending, even urging, that he issue the order and assuring him that his action was not reviewable.

Unfortunately, the result *is* unconstitutional.

CONCLUSION

Therefore, for the foregoing reasons, *amicus curiae* Association of Trial Lawyers of America respectfully submits that the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 1981, true and correct copies of the foregoing Brief for *Amicus Curiae,* the Association of Trial Lawyers of America, were deposited in the United States Post Office with first class postage perpaid and properly addressed to the following parties to this action and others required to be served:

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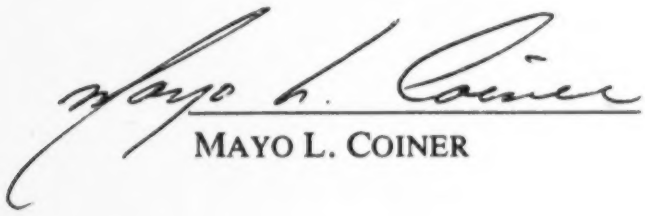

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